



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON, D.C. 20370-5100

ELP

Docket No. 1041-99

30 October 2000

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C.1552

Encl: (1) DD Form 149 w/attachments  
(2) Case Summary  
(3) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the United States Marine Corps, applied to this Board requesting, in effect, removal of the nonjudicial punishment (NJP) imposed on 14 February 1994.

2. The Board, consisting of Messrs. Pfeiffer, Silberman, and Neuschafer, reviewed Petitioner's allegations of error and injustice on 25 October 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Although it appears that Petitioner's application to the Board was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner reenlisted in the Marine Corps on 14 June 1989 for five years as a SSGT (E-6). At the time of his reenlistment, he had completed more than 14 years of prior

active service. He was advanced to GYSGT (E-7) on 1 January 1990.

d. The record reflects that on 10 February 1994 he signed a page 12 entry that he had been given an opportunity to consult with a lawyer with regard to a pending nonjudicial punishment (NJP) for violation of Article 111, Uniform Code of Military Justice (UCMJ), drunk or reckless operation of a motor vehicle. The service record entry states that Petitioner exercised his right to refuse NJP.

e. On 16 February 1994, Petitioner received NJP for violating of Article 111, UCMJ, by refusing a blood alcohol test. Punishment imposed was a forfeiture of \$500. He did not appeal the punishment.

f. On 1 June 1994, Petitioner extended his enlistment for an additional period of seven months to qualify for transfer to the Fleet Marine Corps Reserve. He was honorably transferred to the Fleet Marine Corps Reserve on 13 January 1995.

g. Petitioner asserts that he was not given NJP for drunk and reckless driving of a motor vehicle but for refusing to take a blood alcohol test and states that he refused to accept NJP but it was imposed nonetheless. He says that the commanding general suspended his base driving privileges and the commanding officer fined him \$500, thus punishing him twice for the same incident. He contends that refusing to take a blood alcohol test was not punishable under the UCMJ since a base regulation imposed an automatic suspension of driving privileges.

h. At enclosure (1), a 24 August 2000 advisory opinion from the Military law Branch, Headquarters, Marine Corps, states that the offense alleged as a violation of the UCMJ failed to state an offense. Petitioner had the right to refuse to submit to a chemical test or breathalyzer. Further, the base order states that "the person authorized to administer the chemical test will inform the apprehended person both verbally and in writing" that "he has the right to refuse to be tested," and "the test results, or facts his refusal, will be admissible as evidence at a trial on the offense charged." The advisory opinion also notes that although imposition of NJP for this offense was inappropriate, Petitioner did not appeal the punishment. An appeal, at the very least, would have highlighted the inappropriateness of events surrounding this case. The advisory opinion recommends that relief be granted

given the number of minor administrative errors which when viewed in their totality, calls into question the fairness of the NJP proceedings.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. In this regard, the Board substantially concurs with the comments contained in the advisory opinion that imposition of NJP for refusing to take a blood alcohol test was inappropriate. Whether the command had a basis for charging him for drunk driving cannot be determined at this late date since the NJP evidence is retained for only two years. The Board also notes the record entry to the effect NJP was imposed despite his refusal to accept NJP. The Board concludes that it would be appropriate and just to remove the NJP and return the forfeiture.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all references in the record to the NJP imposed on 14 February 1994.

b. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

c. That any material directed to be removed from Petitioner's naval record be returned to the Board together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross references being made a part of Petitioner's naval record.

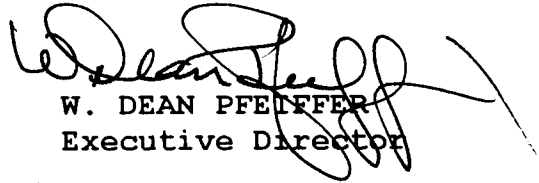
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder



ALAN E. GOLDSMITH  
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6 (e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6 (e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

  
W. DEAN PFETTER  
Executive Director